Supreme Court, U. S.
FILED
SEP 18 1995
CLERK

No. 95-114

In the
Supreme Court of the United States
October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and
STUBBLEFIELD PROPERTIES,
Petitioners,

v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California Fourth Appellate District, Division Two

BRIEF OF ALLIANCE FOR AMERICA, AMERICAN HOMEOWNERS FOUNDATION, AS *AMICI CURIAE** IN SUPPORT OF PETITIONERS

Nancie G. Marzulla
President and
Chief Legal Counsel
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC
20015-2405
(202) 686-4197

September 20, 1995

**Amici* listing continued on next page

[CONTINUED FROM COVER]

BRIEF *AMICI CURIAE* OF

BUILDING INDUSTRY ASSOCIATION,
CITIZENS AGAINST REPRESSIVE ZONING,
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS,
CITIZENS FOR PRIVATE PROPERTY RIGHTS,
DAVIS MOUNTAIN TRANS-PECOS HERITAGE ASSOCIATION,
ENVIRONMENTAL CONSERVATION ORGANIZATION,
GOLDEN STATE RESOURCE MANAGEMENT GROUP,
HILL COUNTRY LANDOWNERS ASSOCIATION,
LAND RIGHTS FOUNDATION,
OREGONIANS IN ACTION LEGAL CENTER,
PENNSYLVANIA LANDOWNERS' ASSOCIATION,
PEOPLE FOR THE WEST! ACCORD CHAPTER,
PUTTING PEOPLE FIRST,
SMALL BUSINESS SURVIVAL COMMITTEE,
TRANS TEXAS HERITAGE ASSOCIATION, and
DEFENDERS OF PROPERTY RIGHTS

QUESTION PRESENTED FOR REVIEW

Does the Due Process Clause of the Fifth and Fourteenth Amendments of the United States Constitution prohibit local governments from making arbitrary and abusive land use decisions that are not related to a legitimate government interest?

TABLE OF CONTENTS

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....iii

IDENTITIES AND INTERESTS OF *AMICI CURIAE*.....3

STATEMENT OF THE CASE.....8

REASONS FOR GRANTING THE PETITION.....13

I. THIS CASE RAISES AN ISSUE OF CRITICAL IMPORTANCE FOR PRIVATE PROPERTY OWNERS -- WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS PROTECTS PRIVATE PROPERTY RIGHTS AGAINST ARBITRARY AND ABUSIVE INFRINGEMENT BY GOVERNMENT.....13

II. THE FAILURE OF THIS COURT TO DEFINE WHAT PROCESS IS DUE AN INDIVIDUAL WITH RESPECT TO THE REASONABLE USE OF HIS PROPERTY HAS LED TO MUCH CONFUSION BY LOWER COURTS.....17

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Daniels v. Williams, 474 U.S. 327 (1986).....15

DeBlasio v. Zoning Bd. of Adjustment,
53 F.3d 592 (3d Cir. 1995).....18

Dolan v. City of Tigard, 114 S. Ct. 2309 (1987).....9, 14

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482
U.S. 304 (1987).....8

Kaiser Aetna v. United States,
444 U.S. 164 (1979).....15

Loan Assn. v. Topeka,
87 U.S. (20 WALL.) 655 (1874).....12

Lucas v. South Carolina Coastal Council,
112 S. Ct. 2886 (1987).....8, 13

Mid-American Waste Systems v. City of Gary,
49 F.3d 286 (7th Cir. 1995).....19

National Paint & Coatings Ass'n v. Chicago,
45 F.3d 1124 (7th Cir. 1995).....19

Nollan v. California Coastal Commission,
483 U.S. 825 (1987).....13,14

Penn Central Transp. Co. v. New York City,
438 U.S. 104 (1978).....15

Triomphe Investors v. City of Northwood,
49 F.3d 198 (6th Cir. 1995).....18

United States Trust Co. v. New Jersey,
431 U.S. 1 (1977).....15

Washington ex rel Seattle Title Trust Co.
v. Roberge, 278 U.S. 116 (1928).....13

UNITED STATES CONSTITUTION

U.S. Const., amend. IV.....8

U.S. Const., amend. V..... *passim*

U.S. Const., amend. XIV..... *passim*

MISCELLANEOUS

James Madison, *Federalist Paper No. 54*.....9

Rosalie Berger Levinson,
Protection Against Government
Abuse of Power: Has the Court Taken the
Substance Out Of Substantive Due Process,
16:2 U. Dayton L. Rev. 312 (1991).....17

Stephen Page, *In My Former Life As A Seagull*,
Wall St. J., Dec. 27, 1994, at A14.....17

No. 95-114

In the
Supreme Court of the United States
October Term, 1995

STUBBLEFIELD CONSTRUCTION COMPANY and
STUBBLEFIELD PROPERTIES,
Petitioners,
v.

CITY OF SAN BERNARDINO,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California Fourth Appellate District, Division Two

BRIEF OF ALLIANCE FOR AMERICA, AMERICAN HOMEOWNERS FOUNDATION, BUILDING INDUSTRY ASSOCIATION, CITIZENS AGAINST REPRESSIVE ZONING, CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS, CITIZENS FOR PRIVATE PROPERTY RIGHTS, DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION, ENVIRONMENTAL CONSERVATION ORGANIZATION, GOLDEN STATE RESOURCE MANAGEMENT GROUP, HILL COUNTRY LANDOWNERS ASSOCIATION, LAND RIGHTS FOUNDATION, OREGONIANS IN ACTION LEGAL CENTER, PENNSYLVANIA LANDOWNERS' ASSOCIATION, PEOPLE FOR THE WEST! ACCORD CHAPTER,

**PUTTING PEOPLE FIRST,
SMALL BUSINESS SURVIVAL COMMITTEE,
TRANS TEXAS HERITAGE
ASSOCIATION, and
DEFENDERS OF PROPERTY
RIGHTS,
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

Pursuant to Rule 37.3 of the Rules of this Court, the *amici* submit this brief *amici curiae* in support of Petitioners, Stubblefield Construction Company and Stubblefield Properties. The *amici* support granting of the Petition for Writ of Certiorari. Consent to the filing of this brief has been granted by counsel for Petitioners and counsel for Respondent, and has been lodged with the Clerk of this Court.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Alliance for America (Gloversville, NY) is a fifty state network of nearly 500 independent, grassroots property rights organizations whose collective membership represents millions of individual property owners all across the country. Groups under the Alliance's umbrella cover the full spectrum of property rights interests including the right to fair application of zoning laws.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF is dedicated to making home ownership possible for non-owners, helping homeowners in need, protecting home values and ownership tax incentives, and helping people make the best informed decision when purchasing a home.

Building Industry Association (Olympia, WA) is a federation of regional and local associations representing over 5,600 members engaged in commercial and light industrial

construction and the building of most of Washington State's residential housing. The interest of BIA-Washington in this case is to ensure that decisions regarding restrictions on development are made in a fair and predictable manner.

Citizens Against Repressive Zoning (East Lansing, MI) is an organization of citizens concerned about over-restrictive zoning laws. CARZ continuously monitors zoning decisions across the nation, and provides resources and advice to persons whose property interests have been adversely affected by zoning laws.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide organization whose mission is to secure private property guarantees provided in the Bill of Rights. CCPR engages in public advocacy projects that foster an awareness of governmental programs that violate the United States Constitution by eroding private property rights.

Citizens for Private Property Rights (Sullivan, MO) is a grassroots organization formed to protect and preserve the legal, equitable and traditional rights of property owners.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgement of private property rights in the Davis Mountains and Trans-Pecos areas. The Association supports private property rights protection through research, public education and other activities. Its mission embraces conservation of natural resources in conjunction with

respect for private property rights, which underlie all other individual liberties.

Environmental Conservation Organization (Hollow Rock, TN) represents more than 500 local, state, regional and national organizations that promote free-market alternatives to regulatory environmental protection. The organization believes that private property rights are the foundation of all free-market options, and that government regulation limits and precludes opportunities for free-market alternatives for environmental conservation.

Golden State Resource Management Group (Moreno Valley, CA) is a private consulting firm providing policy advice to farmers, ranchers, landowners and non-profit associations on the issues of endangered species, natural resource and environmental laws as well as regulations and their effects on land use. Many of Golden State's clients are located in the southern California area.

Hill Country Landowners Association (Georgetown, TX) was formed in 1991 in response to plans to designate a 30,000-acre endangered species habitat in the State of Texas. The Coalition opposes the enlargement of the authority of unelected officials due to the fact that they are not subject to voter approval and their decisions can be remedied only through litigation.

Land Rights Foundation (Gloversville, NY) is an educational organization dedicated to providing information concerning the right to own and enjoy property as guaranteed by the United States Constitution and state constitutions. This

mission is accomplished through *The Land Rights Letter*, a monthly newsletter highlighting legislation, court decisions, individual accounts of regulatory abuse nationwide, and the Land Rights Archive -- an extensive reference and research library.

Oregonians in Action Legal Center (Tigard, OR) is a nonpartisan, nonprofit, public interest law center involved in litigation seeking to protect the constitutional rights of landowners and counter excessive land use regulation. It is financed entirely through the voluntary contribution of time and money from individuals, families, businesses and foundations on a continuing basis. OIA-LC successfully represented the Petitioner in the United States Supreme Court case of *Dolan v. Tigard*, 114 S. Ct. 2309 (1994).

Pennsylvania Landowners' Association (Waterford, PA) was formed to educate property owners about the threat to their property rights and personal freedom posed by increasingly intrusive regulations on land use, to generate public debate, and to develop and implement a strategy to restore reason and balance in environmental regulation -- including regulation in the form of zoning restrictions.

People for the West! Accord Chapter (Phoenix, AZ) is a grassroots organization created to support western communities against the overreaching hand of government. Its membership believes that people who own and depend on the land make better stewards of the environment, and that mankind has the ability to solve any legitimate environmental problems through sound scientific means.

Putting People First (Helena, MT) is a nonprofit organization of citizens who support a return to common sense in man's relationship with nature and civility in relation to his fellow man. They also believe that public policy should be based on science and rationality, not arbitrary political motivations.

Small Business Survival Committee (Washington, DC) is a national, nonprofit, nonpartisan advocacy organization fighting unchecked government taxation and regulation of small business -- the entrepreneurial sector of the United States economy. They believe that this case illustrates the plight of small business owners and entrepreneurs nationwide who follow local, state and federal laws only to become entangled in political and bureaucratic red tape where private property rights have no meaning.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and that environmental regulations and zoning restrictions often unreasonably limit private property ownership.

Defenders of Property Rights (Washington, DC) is a nonprofit public interest law foundation and the nation's only legal defense foundation devoted exclusively to protecting private property rights. Its mission is to vigorously protect those rights considered essential by the Framers of the

Constitution, and to promote a better understanding of the relationship between private property rights and individual rights and liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members, who are owners, users, and beneficiaries of private property, to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders devotes a significant portion of its resources to litigation and has participated in *Lucas v. South Carolina Coastal Council, Dolan v. City of Tigard and Babbitt v. Sweet Home Chapter Communities for a Great Oregon* when they were before this Court.

STATEMENT OF THE CASE

At issue in this case is the extent to which private property rights are protected under the Due Process Clause of the Fifth and Fourteenth Amendments. In recent years, this Court has done much to resuscitate the previously dormant provision in the Fifth Amendment requiring payment of just compensation for the taking of private property. *See, e.g., Lucas v. South Carolina Coastal Council,* 112 S. Ct. 2886 (1987) (government regulation that destroys all beneficial and productive use of private property is a *per se* violation of the Just Compensation Clause of the Fifth Amendment); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304 (1987) (property owner must be paid just compensation for even temporary taking of private property rights).

Most recently, in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 2320 (1994), this Court stated: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation."

However, the Just Compensation Clause cannot be and was not intended by the framers of the Constitution to be the sole provider of full protection for private property rights. Rather, the Constitution contains several provisions designed to accomplish that purpose together. The Fourth Amendment, for example, protects against unreasonable searches and seizures. The Fifth Amendment states that no person shall "be deprived of life, liberty, or property without due process of law." The Fourteenth Amendment echoes the Fifth, stating that no "state shall deprive any person of life, liberty, or property without due process of law."

The Founding Fathers' intent to protect property rights is clear. They considered private property ownership critical to a free society. James Madison, the author of the Bill of Rights, stated this clearly in Federalist Paper No. 54, when he wrote "Government is instituted no less for protection of the property than of the persons of individuals." However, the modern crush of government regulations, and the now virtually unchecked power of government officials over an individual's use of his property (even for laudable purposes), is destroying the genius of the constitutional system of private property rights.

Until recently, this Court has not been called upon to affirm the protections contained in the Due Process Clause as applied to questions regarding the constitutionality of decisions by local officials over local land use. As a result, the court below was able to sanction an interpretation of the Due Process Clause that emasculates the notion of due process in cases such as this. The decision of the court below essentially gives local government free rein to target -- at will -- any private property owner for abuse.

Thus, the issue raised by this case is whether the Due Process Clause will retain its vitality in the face of such a broadside affront as is presented by the decision below. The facts of this case are clear. They paint a picture of local government officials, by virtue of their position and power, using the local government land use review process to wipe out one person's constitutionally-protected private property rights. In the early 1960's, the Petitioners, Stubblefield Construction Company and Stubblefield Properties, purchased approximately 600 acres of property in San Bernardino County, California in order to develop an entire master-planned community, including the 492-unit apartment complex at issue in this case. The thirty acres designated for the apartment units were zoned for such construction. In 1968, the Respondent, the City of San Bernardino, annexed the property with the assurance that existing zoning would be maintained. In reliance on that promise, the Petitioners invested heavily to prepare the property for construction by developing water, power and sewer connections.

In 1986, just when Petitioners thought they were in a position to gain permission from the Respondent to actually begin construction of the project, the City Council moved the goalposts to prevent development of the project. This arbitrary and abusive behavior by the government in refusing to approve the Petitioners' development plans grossly affronts the due process guaranteed to every property owner under the Fifth and Fourteenth Amendments.

Instead of providing a fair and indiscriminatory system of review for land use decisions, the Respondent systematically used every arrow in its quiver to target and kill the Petitioners' development plans. In doing so, it failed to state a single legitimate health, safety, or welfare concern over the project. Rather, as the trial court found, one specific City Councilman was a "powerful opponent" of the Petitioners' development plans. For example, the City Council adopted an "urgency" ordinance which allowed it to freeze the Petitioners' project until it could change the zoning law to further restrict the Petitioners' development plans. The only "urgent" rationale for the ordinance was that it would prevent the project from ever being built. In short, public power was used by elected officials to accomplish personal goals.

After a public hearing, John Stubblefield was told by the mayor of the San Bernardino that he was not allowed to testify regarding his proposed project because "[t]he Council had met [in closed session], they had all made up their mind that this project was going down to defeat so why talk about

it."[1] In 1989, the Respondent finally succeeded in killing the Petitioners' project by adopting a new General Plan for the area which downzoned his property so that only four residential units were permitted.

The pervasive regulatory state existing today, as opposed to fifty or even twenty years ago, makes it imperative that this Court establish that government regulation of the reasonable use of private property, such as that at issue in this case, be applied fairly and rationally. Federal, state and local laws affecting private property have -- in the modern regulatory state -- become an elaborate web of laws and regulations covering every conceivable aspect of property use and ownership.

Therefore, the time has come for this Court to end local tyranny and the cavalier destruction of private property rights. This Court put it well when it declared over a century ago that "A government which held the lives, the liberty and the property of its citizens subject at all times to the absolute despotism and unlimited control of even the most democratic dispository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." *Loan Assn. v. Topeka,* 87 U.S. (20 Wall.) 655, 662 (1874).

By reversing the opinion of the court below, this Court will assure all Americans that their property rights cannot be destroyed at the whim of a local despot.

---

[1] *Reporter's Transcript on Appeal* at 2614.

REASONS WHY THE PETITION SHOULD BE GRANTED

I.

THIS CASE RAISES AN ISSUE OF CRITICAL IMPORTANCE FOR PRIVATE PROPERTY OWNERS -- WHETHER THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS PROTECT PRIVATE PROPERTY RIGHTS AGAINST ARBITRARY AND ABUSIVE INFRINGEMENT BY GOVERNMENT.

This Court has long recognized that a landowner has a constitutional right emanating from the Fifth Amendment "to devote his land to any legitimate use of property within the protection of the Constitution." *Washington ex rel Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121 (1928). This right has been buttressed in recent years by several landmark decisions of this Court applying the Just Compensation Clause to require governments to pay property owners if a regulation effects a taking of private property. *See, e.g., Lucas*, 112 S. Ct. 2886. This Court continues to affirm that the Just Compensation Clause specifically entitles a property owner to make reasonable use of his land: "[T]he right to build on one's own property -- even though its exercise can be subject to legitimate permitting requirements -- cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n. 2 (1987).

Yet, however efficacious the Just Compensation Clause may be in deterring burdensome or confiscatory regulations on private property rights, it has little utility in the face of government actions that discriminatorily target individual property owners -- as do challenged actions in this case. Even the *Nollan* case, which sets forth the farthest application of the Just Compensation Clause in this context of challenging the validity of a confiscatory regulation, only requires that government actions "substantially advance" their stated purpose. *Nollan* does not address the allegations of abuse of authority in situations where government officials misuse legitimate laws and the conduct of the government officials is aimed exclusively at precluding an individual from exercising his constitutional right to use his property. Nor does this Court's recent decision in *Dolan*, 114 S. Ct. 2309 (exactions of private property must be "roughly proportional" to the burden they purport to address), provide relief from the arbitrary infringement of private property rights presented in this case.

As this Court has made clear on many occasions, the Just Compensation Clause is not designed to probe the motivations of the decision makers.[2] Rather, it is a "no-fault" concept that merely requires payment when government action takes private

---

[2] *But see Dolan*, 114 S. Ct. at 2319 (local government's decision to deny a building permit unless the property owner gave to city approximately 10 percent of her property violated the Just Compensation Clause unless the city could show a "rough proportionality between the impact and the extent of the exaction"); *Nollan*, 483 U.S. at 3147 (regulation that impacts private property rights must substantially advance its stated purpose).

property. Once established that a taking is for any legitimate public purpose (and legitimate public purpose is broadly defined),[3] and that the taking substantially advances the stated legitimate public purpose, the only scrutiny under the Just Compensation Clause is whether and to what extent the governmental actions impact a private property owner's reasonable investment-backed expectations. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 136 (1978) (if a zoning law is substantially related to the promotion of the general welfare then the only takings consideration remaining is the severity of the law's interference with the owner's property). Whether the government action is wise, virtuous or even necessary is irrelevant to the constitutional requirement of just compensation. *See Kaiser Aetna v. United States,* 444 U.S. 164, 174 (1979) (the fact that Congress had "expansive authority" to regulate was immaterial to whether or not the regulation went so far as to effect a taking requiring compensation); *see also United States Trust Co. v. New Jersey,* 431 U.S. 1, 29-30 (1977) (no matter how important and legitimate the public purpose is for regulation, the court will not "balance away" constitutional rights).

However, the Due Process Clause is, as the name implies, specifically designed to probe whether the process by which property is infringed is fair. *See Daniels v. Williams*, 474 U.S. 327, 331 (1986) (the purpose of the Due Process Clause

---

[3] *See, eg., Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("deference to the legislature's 'public use' determination is required 'until it is shown to be an impossibility,'" (*citing Old Dominion Co. v. United States,* 269 U.S. 55, 56 (1925)).

is to prevent government from abusing its power or employing it for purposes of oppression). When the process afforded private property owners is unfair, or when local governments succumb to private biases or interests, then clearly the Due Process Clause is implicated. The Due Process Clause, quite simply, forbids *all* deprivations of property by governmental action that is arbitrary, unreasonable or violative of fundamental principles of fairness. Thus, the issue in a due process case is not whether the government has the power to "take" the property, but whether the *deprivation* of property has been accomplished in a *manner* protective of fundamental individual liberties. In short, due process focuses upon the method by which land use controls are imposed, while just compensation examines only the result of the process. To be valid, both the process and result of a land use restriction must comport with these separate but related constitutional protections.

In the present case, it is the misuse of the process that failed to comply with the constitutional requirement of fairness and justice. The repeated and consistent maneuvering and obstructionist conduct of the government officials to halt the Petitioners' project for personal reasons is the gravamen of this due process violation. Indeed, the trial court found that the Respondent arbitrarily changed its zoning law with an intention of sabotaging the Petitioners' development project; the court of appeals even had to concede that the process operated as a "vendetta" against the Petitioners.

Unfortunately, the facts presented here are not unique. Local zoning decisions, because of the inherently *ad hoc* and discretionary nature of the decision-making process, are often subject to abuse and unfairness. *See generally* Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out Of Substantive Due Process*, 16:2 U. Dayton L. Rev. 312 (1991). Decisions regarding the use of one's property all too frequently are driven by local politics and the personalities of the people involved.[4] Over recent years the situation has been exacerbated at the local level due to the increasing number of federal and state laws granting even greater authority to local governments with respect to land use decisions. Thus, strong guidance is needed from this Court to set appropriate standards whereby government officials can exercise their authority in accordance with the constitutional requirement of due process.

II.

THE FAILURE OF THIS COURT TO DEFINE WHAT PROCESS IS DUE AN INDIVIDUAL WITH RESPECT TO THE REASONABLE USE OF HIS

---

[4] Take for example the recent case reported in the Wall Street Journal where a government official voted to deny approval of a requested building permit on a wholly arbitrary basis, stating: "In my former life as a seagull, I was flying up and down the California coastline and saw your house built shaped as a seashell...out of driftwood and feathers." Stephen Page, *In My Former Life as a Seagull*, WALL ST. J., Dec. 27, 1994, at A14.

PROPERTY HAS LED TO MUCH CONFUSION BY LOWER COURTS.

The failure of this Court to articulate definitive standards that govern arbitrary and capricious government decisions concerning property rights in the realm of actions prohibited by the Due Process Clause has led to uncertainty among litigants and judges among the various circuit courts of appeals. Indeed, within just the past few months, federal courts across the nation have wrestled with questions of the nature and extent of due process protections as applied to local land use decisions. In *DeBlasio v. Zoning Bd. of Adjustment*, 53 F.3d 592 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit adopted a broad test holding that property ownership *per se* is entitled to due process protection under the Fourteenth Amendment. Judge Lewis, writing for the Third Circuit, held that a due process claim would lie where the decision limiting land use was arbitrary or irrational.

In contrast, the United States Court of Appeals for the Sixth Circuit has adopted a more restrictive test holding that a plaintiff must show not only a property interest but also that he had a legitimate claim of entitlement to a special use permit or a justifiable expectation that the city council would issue the permit before a cause of action would lie under the Due Process Clause. *Triomphe Investors v. City of Northwood,* 49 F.3d 198 (6th Cir. 1995). In *Triomphe*, the court held that the property owner did not have a "legitimate expectation" to a special permit, even if the requirements for the permit had been

met, because the city ordinance provided that such a permit "may" be granted; the court reasoned that the word "may" gave the city council the discretion to refuse to grant the permit on the basis of any evidence, rather than on substantial evidence. *Id.* at 203.

The most restrictive test of all was announced by the United States Court of Appeals for the Seventh Circuit in *Mid-American Waste Systems v. City of Gary,* 49 F.3d 286 (7th Cir. 1995). In *Mid-American,* the court held that the corporate plaintiff did not have a right to challenge the city's allegedly arbitrary cancellation of its lease because "[t]he only interest at stake is the interest in obtaining the maximum return on investment. This is not a 'fundamental right.'" *Id.* at 291 (citing *National Paint & Coatings Ass'n v. Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995)). This statement suggests that a businessman or certainly a corporation would not have a right under the due process clause to challenge even an illegal denial of a zoning variance if its motive was that of profit.[5]

---

[5] The *Mid-American* decision is constitutionally flawed on its face because it is discriminatory. The Due Process Clause does not exclude corporations and business people from its coverage: it makes all property owners a protected class. If due process means anything, it means that all property owners should have access to the courts to remedy due process violations.

CONCLUSION

Strong policy concerns weigh against this Court's adopting an expansive interpretation of the Due Process Clause. Valid concerns of judicial activism, growing out of the legitimate question of whether courts can objectively define "arbitrary" or "abusive" governmental conduct, argue against an open-ended definition of the clause. Nevertheless, the Constitution states explicitly that individuals shall not be deprived of "property" without "due process of law." However, that is just what happened to the Petitioners in this case. Moreover, it is what is happening and will continue to happen across the country unless this Court definitively holds that the Constitution will not countenance governmental conduct that unfairly or otherwise arbitrarily infringes private property rights.

For all of these reasons, the *amici curiae* strongly urge this Court to grant the requested Petition for Certiorari.

Respectfully submitted,

Nancie G. Marzulla
President and Chief Legal Counsel
DEFENDERS OF PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC 20015
(202) 686-4197

September 20, 1995